No. 08-1448

IN THE
Supreme Court of the United States

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California, and EDMUND G. BROWN, JR., in his official capacity as Attorney General of the State of California,
Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Respondent Entertainment Merchants Association, through its undersigned counsel, hereby states that it does not have a parent corporation and that no publicly held company owns 10% or more of its stock.[*]

Respondent Entertainment Software Association, through its undersigned counsel, hereby states that it does not have a parent corporation and that no publicly held company owns 10% or more of its stock.

[*] At the outset of this litigation, Respondent Entertainment Merchants Association was known as the Video Software Dealers Association. Respondent asks that Court's docket be updated to reflect Respondent's current name.

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INTRODUCTION

Despite Petitioners' efforts to conjure up some argument for review of the Ninth Circuit's decision, in reality the decision is a routine application of established First Amendment principles to a content-based ban on protected expression. In 2005, California enacted a law ("the Act") that makes it illegal to sell or rent video games with certain kinds of violent content to minors. Cal. Civ. Code §§ 1746-1746.5. A number of other jurisdictions have passed similar laws in recent years. All of those laws have been struck down on First Amendment grounds. *Entm't Software Ass'n v. Swanson*, 519 F.3d 768 (8th Cir. 2008); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) ("*IDSA*"); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir.), *cert. denied*, 534 U.S. 994 (2001) ("*AAMA*") (preliminary injunction); *Entm't Merchants Ass'n v. Henry*, No. Civ-06-675-C, 2007 WL 2743097 (W.D. Okla. Sept. 17, 2007); *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006); *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006); *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005), *aff'd*, 469 F.3d 641 (7th Cir. 2006); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

In a careful and closely reasoned opinion that expressly embraced the reasoning adopted by these other courts, a unanimous panel of the Ninth Circuit affirmed a district court decision permanently enjoining the Act. The Court of Appeals, like all of

the other courts before, observed that video games contain the type of expression (music, art, narrative) that is protected by the First Amendment, and that the Act selectively restricts distribution of video games based on their content. Pet. App. 16a-17a. Applying strict scrutiny, the court held that the evidence invoked by California to justify the Act suffered from "significant, admitted flaws in methodology" and "did not support the Legislature's purported interest in preventing psychological or neurological harm" to minors – a conclusion shared by the many other courts that have considered that same evidence. Pet. App. 31a. The Ninth Circuit also found that the State had wrongly chosen to ban the games without exploring less restrictive alternatives, such as working with parents and retailers, and using the existing voluntary Entertainment Software Rating Board rating system, to ensure that minors play games that their parents deem appropriate for their age. Pet. App. 32a-34a.

Petitioners offer no persuasive reason for the Court to review this ruling. There is no split of authority on the questions presented. To the contrary, the lower courts are unanimous as to the constitutionality of bans on distribution of violent video games. That is unsurprising since the proper approach to resolving these questions is well established in prior decisions of this Court. This Court, for example, has long recognized that the obscenity exception to the First Amendment is confined to sexually explicit materials. And it has just as clearly held that, when courts are applying

strict scrutiny to content-based regulations of speech, they must scrutinize the proffered justifications to assure that there is evidence that the law actually serves real and legitimate state interests. There is no need for the Court to revisit these familiar principles just because they have now been applied, in a consistent series of cases, to a new medium of creative expression.

STATEMENT

A. Respondents and the Nature of Video Games.

Respondents are associations of companies that create, publish, distribute, sell and/or rent video games, including games that may be regulated as "violent video games" under the Act. Video games are a modern form of artistic expression. Like motion pictures and television programs, video games tell stories and entertain audiences through the use of complex pictures, sounds, and text. *See* Pet. App. 16a-17a. These games frequently contain storylines and character development as richly detailed as (and sometimes based on) books and movies. *Id*. 9a. Like great literature, games often involve themes such as good versus evil, triumph over adversity, struggle against corrupt powers, and quest for adventure. Excerpts of Record ("ER") 68-69, 76-90. For example, both *Resident Evil 4* and *Tom Clancy's Rainbow Six 3* – two of the games that Respondents have placed in the record – contain detailed plots and battles of good against evil, and each parallels movies (*Resident Evil*) or a book (*Rainbow Six*) that minors

in California are legally able to obtain without restriction. ER 78-80, 87-88.

These games also contain depictions of violence. *Resident Evil 4*, for example, allows the main character to "kill" images of zombies or mutants. ER 79-80. Another game, *God of War*, provides a storyline drawn from Greek mythology. ER 83-86; *see also Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 650 (7th Cir. 2006) (noting that *God of War* "tracks the Homeric epics in content and theme"). The game follows the adventures and travails of Kratos, a Spartan warrior, in his efforts to kill Ares, the God of War, in a complex quest that takes him through ancient Athens and Hades. ER 83-86.

B. The Video Game Industry's Voluntary Rating System.

Like other popular media, including motion pictures and television, the video game industry has adopted a voluntary and widely used rating system for video games. Pet. App. 10a. That system, which the Federal Trade Commission ("FTC") has called the "most comprehensive" of industry-wide media rating systems, is implemented by the Entertainment Software Rating Board ("ESRB"), a self-regulatory body that assigns independent age ratings and content descriptions for video game content. *Id.*; ER 95. The ESRB gives one of six age-specific ratings to each game it rates: EC (Early Childhood); E (Everyone); E10+ (Everyone 10 and older); T (Teen); M (Mature); and AO (Adults Only). Pet. App. 10a, n.9. The ESRB also assigns content descriptors to each game, such as "Crude Humor,"

"Language," "Suggestive Themes," and "Cartoon Violence," among over two dozen others. *Id*. 10a.

The purpose of the ESRB system is to provide easily understood information about games to consumers and parents to empower them to make informed choices about the games they may buy, rent, or play. ER 95. Like the movie rating system, the ESRB system is entirely voluntary; nonetheless, the program has a high participation rate, *id*., as games cannot be certified for publication on any game console without an ESRB rating, and major retail outlets will not carry games that do not have an ESRB rating. Similarly, video game retailers throughout the nation are part of a widespread and voluntary effort to educate consumers about the ESRB system and to implement a store-by-store policy of preventing the sale of "M" games to individuals under age 17. ER 60.

Although imperfect, these efforts have been successful. The FTC has found that parents are involved in 83% of video game purchases for minors. ER 95-96. Moreover, when unaccompanied minors do attempt to purchase M-rated games, their chances of success are much less than when minors attempt to purchase R-rated DVDs or CDs with explicit lyrics. *Blagojevich*, 404 F. Supp. 2d at 1075; Press Release, FTC, *FTC Issues Report on Marketing Violent Entertainment to Children* (Apr. 12, 2007), available at http://www.ftc.gov/opa/2007/04/marketingviolence.shtm*; see also* Press Release, FTC, *Undercover Shoppers Find It Increasingly Difficult for Children to Buy M-Rated Games* (May 8,

2008), available at http://www.ftc.gov/opa/2008/05/secretshop.shtm (FTC findings from 2008 showing that 80 percent of retailers declined to sell M-rated games to minors). Further, the current-generation game consoles manufactured by Microsoft, Nintendo, and Sony include parental controls allowing parents to limit a child's playing of games based on the games' rating. ER 1236.

C. The Act.

The Act imposes a civil penalty of up to $1,000 on any person who "sell[s] or rent[s] a video game that has been labeled as a violent video game to a minor." Cal. Civ. Code § 1746.1(a). A "violent video game" is defined by the Act as one "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted" in a manner that meets one of two sets of criteria. *Id.* § 1746(d)(1). The first set of criteria – the only portion that California defended below – requires that the depictions be such that "[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors," be "patently offensive to prevailing standards in the community as to what is suitable for minors," and "cause[] the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors." *Id.* § 1746(d)(1)(A). Under a second provision, which California has conceded is unconstitutional, a game is restricted if the actions depicted enable "the player to virtually inflict serious injury upon images of human beings or characters

with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim." *Id.* § 1746(d)(1)(B) (ER 22).

The Act's "violent" video game ban purportedly serves two purposes: "preventing violent, aggressive, and antisocial behavior" and "preventing psychological or neurological harm to minors who play violent video games." Pet. App. 23a-24a; 2005 Cal. Legis. Serv. Ch. 638 (A.B. 1179 § 1(c)); ER 22. Furthermore, the Act purports to make "findings" that "[e]xposing minors to depictions of violence in video games" makes them "more likely to experience feelings of aggression, to experience a reduction of activity in the frontal lobes of the brain, and to exhibit violent antisocial or aggressive behavior," and that "[e]ven minors who do not commit acts of violence suffer psychological harm from prolonged exposure to violent video games." *Id.* §§ 1(a), (b) (ER 22).

In addition to imposing substantial penalties on persons who sell or rent "violent" video games to minors, the Act imposes an additional, content-based burden on video games. The Act provides that "[e]ach violent video game that is imported into or distributed in California for retail sale shall be labeled with a solid white '18' outlined in black. The '18' shall have dimensions of no less than 2 inches by 2 inches" and must be placed on the face of the video game package. Cal. Civ. Code § 1746.2.

D. The District Court's Decisions.

Respondents brought suit in the Northern District of California seeking to enjoin enforcement of the Act under the First Amendment. The district court issued two opinions, one granting a preliminary injunction and one granting summary judgment for Respondents.

In its decisions, the district court recognized that video games are "protected by the First Amendment" and that "[c]hildren 'are entitled to a significant measure of First Amendment protection.'" Pet. App. 46a-47a (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975)). The Court then rejected Petitioners' argument that the deferential standard of review under *Ginsberg v. New York*, 390 U.S. 629 (1968), should be extended beyond restrictions on sexual speech to minors, and should govern this case. Pet. App. 53a-57a. Applying strict scrutiny, the court held that the State had not shown that the Act furthered the State's purported interests because the State's "evidence does not establish the required nexus between the legislative concerns about the well-being of minors and the restrictions on speech required by the Act." *Id*. 64a. The court concluded that "there has been no showing that violent video games as defined in the Act, *in the absence of other violent media*, cause injury to children," and that "the evidence does not establish that video games … are any more harmful than violent television, movies, internet sites or other speech-related exposures." *Id.* (emphasis in original).

In addition, the district court held that the State had failed to demonstrate that plausible, less restrictive alternatives would be ineffective to achieve the State's goals. In particular, the court held that the State failed to demonstrate that "industry labeling standards, either alone or combined with technological controls that enable parents to limit which games their children play," are insufficient to protect the State's interest. *Id.* 62a.

E. The Ninth Circuit's Decision.

Petitioners appealed to the Ninth Circuit, which affirmed unanimously. After establishing that it was undisputed that video games contain expressive elements that are generally protected by the First Amendment, the Court of Appeals began by rejecting the invitation "to boldly go where no court has gone before" and hold that violent expression could be treated as obscenity for minors. Pet. App. 23a. In a thorough discussion that canvassed both this Court's precedents and the many lower court precedents, the Ninth Circuit explained that obscenity had always been limited to material containing sexual expression. *Id.* 17a-22a. It observed that these limits on obscenity applied with equal force in the context of minors' First Amendment rights. Citing *Ginsberg*, the Court of Appeals explained that the case was concerned with "the relationship between the state and minors with respect to … 'sex material'" and was not an open-ended invitation to restrict other material for minors. *Id.* 22a.

The Court of Appeals then concluded that the Act failed strict scrutiny. Beginning with this Court's longstanding recognition that a content-based restriction on expression is "presumptively invalid," *id*. 23a (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)), the court first considered whether the Act furthers a compelling state interest. It concluded that the protection of the psychological and neurological health of minors was a compelling interest in the abstract, but it went on to observe that the government could not engage in "thought control" for the sake of helping minors, and that any claim of a compelling interest would need to be supported by evidence that demonstrates "a causal link between minors playing video games and actual psychological or neurological harm." *Id*. 31a-32a. The court stressed that the State did not need to prove its point to a "scientific certainty," but that it did need to point to evidence that at least made it reasonable to infer that video games were in fact harmful. *Id*. 32a.

The Ninth Circuit then reviewed the evidence presented by the State and found it severely lacking on multiple fronts. First, the court observed that none of the evidence even claimed to prove that depictions of violence in video games *cause* any sort of harm. Instead, the studies were *correlative* in nature. *Id*. 31a-32a. Second, it found that the studies largely attempted to show a correlation between aggression and video games, rather than linking them to psychological or neurological harm. Because Petitioners had disclaimed any interest in regulating video games to prevent violence, the

Court of Appeals found the studies inapposite to support California's claimed interests. *Id.* 30a. The court also identified other methodological flaws in the studies cited by the State, such as a reliance on small sample sizes. *Id.* 28a. Taken together, the Ninth Circuit held that Petitioners' evidence failed to support the Act, a conclusion it noted that numerous other courts had reached in reviewing the same evidence. *Id.* 29a, 31a-32a (citing *AAMA, Blagojevich, Hatch, Granholm*).

Finally, the Ninth Circuit found that the Act was also unconstitutional because it was not the least restrictive means of accomplishing California's objectives. Citing this Court's decision in *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000), the Court of Appeals observed that California had not even tried to work with parents and retailers to achieve its goals. Pet. App. 33a-34a. The court also noted that California had ignored the availability of parental controls on video game consoles that allow parents to limit the type of games playable on the console. *Id.* 33a.

Having concluded that the Act failed strict scrutiny, the Ninth Circuit declined to reach Respondents' other arguments, including a claim that the Act was unconstitutionally vague.

REASONS FOR DENYING THE WRIT

I. The Decision Below Applied Settled Law in a Manner Entirely Consistent with Every Comparable Ruling in Other Circuits.

Petitioners offer no persuasive argument for a grant of review of a decision in which the Ninth Circuit merely applied settled law in an area where there is a strong consensus among the lower courts.

Violence as obscenity. California was not the first state to try to restrict distribution of video games it considered too violent for minors. Such laws have proved politically popular, but every one has been struck down under the First Amendment. In those cases, two other circuit courts and six district courts have addressed the question whether violent video games may be treated as obscenity for minors. Each has concluded, as the Ninth Circuit did here, that the obscenity-for-minors exception to the First Amendment cannot be stretched to encompass violent expression. *See IDSA*, 329 F.3d at 958 ("Simply put, depictions of violence cannot fall within the legal definition of obscenity for either minors or adults."); *Swanson*, 519 F.3d at 771;[2] *AAMA*, 244

[2] The Eighth Circuit has held that violent video games may not be regulated as obscenity on two different occasions. *See supra*. It has also held that videos of movies containing violence are not obscene for minors. *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 688 (8th Cir. 1992) (striking down ban on rental of violent videos to minors and holding that videos "contain[ing] violence but not depictions or descriptions of sexual conduct cannot be obscene").

F.3d at 574 (holding that "[v]iolence and obscenity are distinct categories of objectionable depiction" and refusing to treat violent video games as obscenity); *Henry*, 2007 WL 2743097, at *4; *Foti*, 451 F. Supp. 2d at 830; *Entertainment Software Ass'n v. Hatch*, 443 F. Supp. 2d 1065, 1068 (D. Minn. 2006), *aff'd* 519 F.3d 768 (8th Cir. 2008); *Granholm*, 426 F. Supp. 2d at 652; *Blagojevich*, 404 F. Supp. 2d at 1076; *Maleng*, 325 F. Supp. 2d at 1185.

In addition, in closely related contexts, two other circuits have refused to treat violent expression as obscenity for minors. *See James v. Meow Media, Inc.*, 300 F.3d 683, 698 (6th Cir. 2002), *cert. denied* 537 U.S. 1159 (2003) (declining to "extend our obscenity jurisprudence to violent, instead of sexually explicit, material" in tort suit against creators of movies and video games containing violent expression); *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 67 (2d Cir. 1997) (holding that "trading cards" featuring infamous criminals were not obscenity for minors).

Petitioners gloss over these precedents in two terse footnotes, Pet. 5-6 nn. 1&2, but the Ninth Circuit expressly embraced them in holding that violent expression is not obscenity. Pet. App. 20a-21a, 22a-23a (citing *IDSA*, *AAMA*, *Granholm*, *Maleng*, *Webster*, *James*, and *Eclipse*). There is no need for this Court to take up a question that has been answered so consistently in the lower courts.

Moreover, the Ninth Circuit's decision is an unremarkable application of this Court's precedents, which have frequently observed that expression must

include a sexual component to be classified as obscenity. In *Miller v. California*, this Court set forth the modern test for obscenity and expressly held: "State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which *depict or describe sexual conduct*." 413 U.S. 15, 23-24 (1973) (emphasis added) (internal citations omitted).

Miller echoed earlier obscenity precedents that likewise tied obscenity to sexual expression. In *Roth v. United States*, this Court observed that "[o]bscene material is material *which deals with sex* in a manner appealing to prurient interest." 354 U.S. 476, 487 (1957) (emphasis added). And in *Cohen v. California*, it held that a jacket displaying a non-sexual "scurrilous epithet" was not obscene because obscene "expression must be, in some significant way, erotic." 403 U.S. 15, 20, 22 (1971).

The requirement that obscenity be limited to sexual expression is unchanged in the context of obscenity for minors. In *Ginsberg*, this Court held that sexually explicit materials could be regulated as obscenity for minors, even when they did not rise to the level of obscenity for adults. *Ginsberg*, 390 U.S. at 641. As the Ninth Circuit explained, *Ginsberg* was thus a narrow holding that was concerned solely with the "relationship between the state and minors with respect to a certain subject matter – 'sex material.'" Pet. App. 22a (citing *Ginsberg*, 390 U.S. at 636-37).

The Ninth Circuit's decision not to treat non-sexual expression as obscenity for minors directly follows from these precedents and creates no conflict in the law warranting this Court's review.

Proof of harm. Review is equally unwarranted for the second question Petitioners raise: whether strict scrutiny requires California to show a causal relationship between violent video games and harm to minors. The Ninth Circuit held that, although the State was not required to demonstrate that video games were harmful to a "scientific certainty," it was required to come forward with evidence that establishes "a causal link between minors playing violent video games and actual psychological or neurological harm." Pet App. 31a-32a. That holding, too, is a straightforward application of this Court's strict scrutiny precedents that creates no conflict among the circuits.

First, as Petitioners tacitly concede, the Ninth Circuit's application of the strict scrutiny standard of proof is consistent with the determinations of every other court to have considered the issue. For example, in *IDSA*, the Eighth Circuit held that the government was required to come forward with more than "anecdote and supposition" to justify restricting protected expression. *IDSA*, 329 F.3d at 959 (quoting *Playboy*, 529 U.S. at 822). And in *AAMA*, the Seventh Circuit found that the government had no "compelling" interest in regulating video games given that the studies it cited "d[id] not find that video games have ever caused anyone to commit a violent act." *AAMA*, 244 F.3d at 578.

The district courts have reached the same conclusion. In *Blagojevich*, after a full trial, the court found that Illinois "had come nowhere near making the necessary showing" to restrict violent video games because it had failed "to present substantial evidence showing that [they] cause[] minors to have aggressive feelings or engage in aggressive behavior." 404 F. Supp. 2d at 1074; *see also Maleng*, 325 F. Supp. 2d at 1189 ("[T]he Court finds that the Legislature's belief that video games cause violence, particularly violence against law enforcement officers, is not based on reasonable inferences drawn from substantial evidence."). Three other district courts favorably cited the causation analysis of these decisions. *Granholm*, 426 F. Supp. 2d at 652-53 (quoting *Blagojevich* decision); *Foti*, 451 F. Supp. 2d at 832 ("[M]uch of the same evidence [presented by the government] has been considered by numerous courts and in each case the connection was found to be tenuous and speculative."); *Henry*, 2007 WL 2743097 at *6 n.4 (observing the lack of any evidence to support regulating video games but observing that other courts had reviewed "extensive research" and had found it "tenuous, speculative, and uncompelling").

All told, the Ninth Circuit's approach to the State's evidence is consistent with the approach taken by the two other Courts of Appeals and six district courts that have addressed the question. No court has adopted a more lenient standard, let alone concluded that the social science evidence supported regulation.

The decision is also consistent with this Court's holdings concerning strict scrutiny. As explained in greater detail below, this Court has consistently required a heightened evidentiary showing to satisfy strict scrutiny. *See infra* Part III. The Ninth Circuit merely applied those principles of heightened review and presumptive unconstitutionality in holding that California needed to come forward with at least some evidence that video games cause harm to minors.[3]

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In sum, the Ninth Circuit's decision adds to a unanimous and sizeable consensus in the lower courts, and faithfully applies the principles this Court has set out in the First Amendment area. This Court's review of the case is therefore unwarranted.

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[3] Petitioners suggest that this Court's recent decision in *FCC v. Fox Television Stations, Inc.* has authorized a more lenient standard. Pet. 13-14. But that decision involved deferential review of agency action under the Administrative Procedure Act in which any reasoned explanation is sufficient to support regulation. 129 S. Ct. 1800, 1813-14 (2009). Moreover, the decision reviewed regulation in the broadcasting context, an area in which the government has traditionally had greater power to regulate expression. *Id.* at 1819-22 (Thomas, J. concurring) (citing *Red Lion* and *Pacifica).* That precedent has no application in the context of strict scrutiny, which is the polar opposite of arbitrariness review in terms of the deference accorded to agency action pertaining to broadcasting.

II. This Case Would Be a Poor Vehicle for Considering the Questions Presented.

Even if this Court were inclined to review the consensus conclusions of the lower courts reflected in the Ninth Circuit's decision, this case would not be a good vehicle for such a review.

First, the record does not contain even a single game that Petitioners can claim would be covered by the statute. The statute twice provides that works must be judged "as a whole." Cal. Civil Code § 1746(d)(1)(A)(i), (iii). But the only portions of video games that Petitioners submitted in the district court were isolated scenes from selected games. As the Ninth Circuit noted, such brief excerpts do not "include any context or possible storyline within which the violence occurs." Pet. App. 9a-10a, n.8.[4] That means that it is impossible to assess whether the games involved would meet the statutory requirements. This Court should not attempt to carve out a new obscenity doctrine on a record devoid of meaningful evidence of what the State is purporting to regulate. That is particularly true here, where one of the main questions about the proposed new category of supposed "violent obscenity" is whether it is really possible to differentiate between violent works that are and are not "obscene."

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[4] Respondents placed six video games containing depictions of violence into the record, but Petitioners have refused to say whether they would be covered by the Act. The State's hesitancy on this score points to the Act's vagueness. *See infra.*

Second, the judgment below is supported by an alternative ground: the Act's definition of prohibited expression is unconstitutionally vague. The Act prohibits video games that appeal to a minor's "deviant" and "morbid" interests. Cal. Civ. Code § 1746-1746.5. In addition, it applies to depictions of violence to "an image of a human being." *Id.* § 1746(d)(1). The Ninth Circuit had no occasion to address vagueness in light of the Act's numerous other flaws, but similar language has been struck down as vague by other courts, which have noted that such terms have no defined meaning. *Granholm*, 426 F. Supp. 2d at 655-56 (finding the term "morbid" to be vague in this context); *Foti*, 451 F. Supp. 2d at 836 (same); *Webster*, 968 F.2d at 690 (affirming district court's conclusion that statute lacks requisite specificity because, *inter alia*, term "morbid" was not defined); *Blagojevich*, 404 F. Supp. 2d at 1077 (prohibition on depictions of "human" violence vague in the context of video games where superhuman characters are common). Indeed, Petitioners have not even been willing to take a position on whether the games that Respondents submitted in the record are covered by the Act.

This Court is properly reluctant to grant review when an alternative ground supports the outcome below. *Cf. Northwest Austin Municipal Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2573 (2009) ("It is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.") (quoting *Escambia County v. McMillan*,

466 U.S. 48, 51 (1984) (per curiam) (internal quotation marks and alteration omitted)).

Third, additional alternative grounds support the Ninth Circuit's application of the strict scrutiny standard. Petitioners ask this Court to address whether a causal standard is appropriate, but the Ninth Circuit's conclusion that the Act failed strict scrutiny was based in part on reasons other than a failure to show causation. The Court of Appeals found that the Act was not the least restrictive means of achieving California's goals. *See supra* at 11. And even with respect to the studies themselves, the Ninth Circuit found that their flaws went deeper than failing to demonstrate causation. For example, the court noted that the proffered studies were geared almost exclusively towards attempting to show a link between video games and violent behavior, an argument that Petitioners specifically disclaimed. Pet. App. 24a, 28a-30a; *id*. 31a (studies do not "support the Legislature's purported interest in preventing psychological or neurological harm"). The Court also found that the studies suffered from "significant, admitted flaws in methodology," such as relying on a small sample size and the selective use of data. *Id*. 31a.

In short, the issues raised by California come to this Court on an insufficient record and the outcome below is supported by numerous alternative grounds. These defects make the petition a particularly poor vehicle for considering the questions presented, even if the Court were otherwise inclined to do so.

III. The Decision Below Is Correct on the Merits.

Apart from failing to meet the standards for certiorari review, the Ninth Circuit's decision is plainly correct.

A. The Court of Appeals Correctly Did Not Treat Violence as Obscenity.

In over fifty years of obscenity jurisprudence, this Court has never applied the obscenity doctrine outside the context of sexual speech. What the State proposes in this case would effect a sea change in the permissible regulation of all media – including books, movies, and television programs – that contain violent content and are accessible to minors. The Court should not extend the obscenity doctrine beyond its current narrow scope to encompass a broad and ill-defined category of violent expression.

1. First, the premise of Petitioners' argument – that minors are deserving of lesser First Amendment protection and must be shielded from violent speech in order to protect them – is fundamentally inconsistent with the Court's First Amendment jurisprudence. The rule in *Ginsberg* is a narrow extension of a category of wholly unprotected speech in the context of minors, but the general rule is that First Amendment protections apply to minors and that parents, not the government, are the proper arbiters of what minors may view.

The Court has long held that "[m]inors enjoy the protection of the First Amendment." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 231 (2003).

Outside of limited contexts such as public schools, the government may not generally act as a censor on what material is appropriate for minors. As the Court held in striking down an ordinance that restricted the display of non-obscene nudity visible to minors:

> Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.

Erznoznik v. City of Jacksonville, 422 U.S. 205, 213-14 (1975) (footnote omitted).

The proper arbiters of what minors view are parents, not the government. "A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act." *Playboy*, 529 U.S. at 805. The State's argument that depictions of violence fall outside First Amendment protection would reverse this established presumption. The State may not simply substitute its judgment in the guise of assisting parents. *See, e.g.*, *IDSA*, 329 F.3d at 959-60 (rejecting argument that "the government's role in helping parents to be the guardians of their children's well-being is an unbridled license to government to regulate what minors read and view"); *AAMA*, 244 F.3d at 578

("[C]onditioning a minor's First Amendment rights on parental consent of this nature is a curtailment of those rights").

Contrary to Petitioners' argument, *see* Pet. 7-10, *Ginsberg* is a narrow extension of a category of *unprotected* speech to minors. As discussed *supra* at 13-14, the Court has limited the obscenity doctrine to sexual materials, and there is no basis for departing from that well-settled principle here. Likewise, the Court has never applied *Ginsberg* outside of sexual content and has held that it constitutes "relatively narrow and well-defined circumstances" permitting government restriction of speech to minors. *Erznoznik,* 422 U.S. at 213; *see also Miller*, 413 U.S. at 23-24 (obscenity doctrine is "carefully limited").

Petitioners' position that the Court should hold that the expression covered by the Act falls outside the First Amendment is expansive and would set a dangerous precedent. Under Petitioners' argument, the government could censor a wide variety of information and images to minors without any judicial scrutiny of the effect of such images or the efficacy of the government's restriction. The history of the development of media is filled with such knee-jerk attempts to suppress new expressive works based on a generalized fear that they are "dangerous," particularly for children. *See, e.g.*, *Winters v. New York*, 333 U.S. 507, 510 (1948) (true crime novels); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (motion pictures); *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 65-66 (2d Cir. 1997) (trading cards); *Juvenile Delinquency (Comic*

Books): Hearings Before the Subcomm. To Investigate Juvenile Delinquency in the United States of the S. Comm. on the Judiciary, 83rd Cong. (Apr. 21, 22, June 4, 1954) (comic books). Strict scrutiny must be applied to guard against the tendency to overreact to novel forms of expression.

2. Second, contrary to Petitioners' suggestion, the rationales for placing obscenity outside the protection of the First Amendment do not apply to depictions of violence – in video games or any other media. The Court has long recognized that certain obscene sexual expression may be banned based on its appeal to the "prurient interest," not because it leads to "antisocial conduct." *Roth*, 354 U.S. at 485-87; *see also supra* at 14 (reviewing precedents limiting obscenity to sexual expression). Sex, unlike violence, is a subject uniquely considered to be outside children's purview. Violence, on the other hand, is a regular part of children's literature and stories, which "engages the interest of children from an early age, as anyone familiar with the classic fairy tales . . . is aware." *AAMA*, 244 F.3d at 577. As Judge Posner has noted, the sexual magazines at issue in *Ginsberg* were plainly "an adult invasion of children's culture and parental prerogatives" whereas video games "with their cartoon characters and stylized mayhem are continuous with an age-old children's literature on violent themes." *Id.* at 578.[5]

[5] Petitioners concede that the state statutes cited on pages 10-11 of the petition all concern prohibitions on depictions of sexual conduct, in those cases sexually violent conduct. While certain depictions of sexual violence may properly be treated as

Indeed, limiting exposure to violent content to 17-year-olds "would not only be quixotic, but deforming; it would leave [minors] unequipped to cope with the world as we know it." *Id.* at 577. Such concerns are simply not present with the *Ginsberg* category of obscene sexual speech that may be prohibited to minors.

At bottom, the State's rationale for treating depictions of violence as obscenity rests not on a workable analogy to restrictions on some sexual speech, but rather on two separate, impermissible motivations. First is a concern that exposure to images of violence will itself cause minors to commit actual violence, an argument cited by the California Legislature that underlies much of the State's social scientific research. *See* Pet. App. 24a-25a; Brief of *Amicus* Eagle Forum Education & Legal Defense ("EFELDF Br.") 12-13 (parading purely anecdotal evidence that video games were somehow "associated" with various crimes). That argument founders on *Brandenburg v. Ohio*, 395 U.S. 444 (1969); the government may not restrict speech to prevent violent behavior by recipients except where the targeted expression "'is *directed to* inciting or producing *imminent* lawless action and is *likely* to incite or produce such action.'" *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (quoting *Brandenburg*, 395 U.S. at 447).

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obscene, it is the sexual component of the images that makes it so, not violence standing alone.

California's second motivation is to deter minors from thinking certain aggressive thoughts out of a sense that those thoughts are somehow deforming. Petitioners, relying on social science research, concede that the State is concerned with minors' "aggressive thoughts" and "desensitization to violence." Pet. 2; *see also* EFELDF Br. 4 (claiming that "images burn into children's impressionable minds"). But while expressive works like video games, movies or literature certainly "may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought," *Joseph Burstyn,* 343 U.S. at 501, that is not a permissible ground for government regulation. The government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Free Speech Coalition*, 535 U.S. at 253 (citation omitted); *see also American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985) ("Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us."), *aff'd* 475 U.S. 1001 (1986).

The State's "psychological harm" rationale in this case is simply a repackaging of those two impermissible rationales. While prevention of psychological harm to minors is a compelling interest in the abstract, the evidence cited by the Petitioners and *amici* relies heavily on preventing allegedly aggressive responses to stimuli and aggressive thoughts and desensitization. *Supra* at 20. The government's abstract concern with minors'

psychological well-being in this case simply does not justify banning a novel category of speech without searching judicial review. This Court's obscenity jurisprudence is clear that content-based regulations sweeping beyond obscenity must be subject to strict scrutiny. *See Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989).

3. Third, it would be impossible to extend the "carefully limited" boundaries of permissible obscenity regulation to depictions of violence without creating an intractable problem of how to define what speech could be outlawed. *Miller*, 413 U.S. at 23-24. The Court has been careful to closely guard those boundaries in the obscenity context. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963) (method a state uses to identify obscene materials must "scrupulously embody the most rigorous procedural safeguards" to prevent restriction of non-obscene materials). As noted above, the Act's definition of covered material is hopelessly vague and is not tied to the State's purported interests. Nothing in the Act's definition, or in any of the social science research cited by the State, provides a basis for determining what images of violence are allegedly so damaging to minors that they may be banned. The State fails to explain how to determine what constitutes prohibited violence against an "image of a human being," or why minors should be shielded from depictions of violence against an image of a human being rather than depictions of violence against a zombie, god, robot, or any other fantastical creature. The State's proposal to treat depictions of

simulated violence as obscenity has no stopping point.

B. The Court of Appeals Correctly Required Substantial Evidence of Proof of a Causal Relationship Between Video Game Violence and "Psychological Harm" to Minors.

The Court of Appeals was also plainly correct in requiring the State to provide sufficient evidence that the prohibited depictions of violent images in video games actually *cause* harm to minors. As explained in Part I *supra*, the Court of Appeals applied the proper strict scrutiny standard in assessing the constitutionality of the Act, and therefore review of that application is not warranted. The standard applied by the Court of Appeals – and not the lower "quantum of evidence" standard suggested by the State, Pet. 11 – also is undoubtedly correct.

Strict scrutiny is a searching standard designed to ensure that only content-based regulations that are strictly necessary to address a compelling state interest survive. *R.A.V.*, 505 U.S. at 395. Without a causal connection between the speech and the harm the government is seeking to address, there is no way to ensure that the regulation is narrowly tailored to promote the government interest, that it is actually directed to solving the purported harm, or that it is the least restrictive means of alleviating the harm. *See Playboy*, 529 U.S. at 813; *Free Speech Coalition*, 535 U.S. at 250 (rejecting government's argument that it could ban images of "virtual child

pornography," and holding that "the *causal link* is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.") (emphasis added). Failing to require some proof of causation in this context would thus eviscerate the requirements of strict scrutiny.[6]

Admittedly lacking any proof of causation, the State argues that the Court should lower the quantum of evidence required for a Legislature to "predict" or "infer" that violent video games cause harm to children. Pet. 5, 12. That argument should be rejected as inconsistent with the requirements of strict scrutiny.

First, the correlational evidence submitted by the State in this case is simply too flimsy to be used to justify content-based restrictions. The difference between "causal" and "correlational" evidence here is not merely a matter of semantics; as the district

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[6] Indeed, even in cases involving regulation of commercial speech applying intermediate levels of scrutiny, the Court has demanded proof that the challenged regulation actually ameliorates the purported harm. *E.g.*, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995) (upholding lower court finding of no "credible evidence" that dissemination of alcohol would cause allegedly harmful "strength wars"); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (plurality) ("'[S]peculation or conjecture' . . . is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest."); *id.* at 531-32 (O'Connor, J., concurring) (Court must employ "closer look" at effectiveness of speech regulation and not merely defer to legislative judgment).

court in *Blagojevich* concluded, after a full trial on the same evidence, without *any* evidence of causation, "it is impossible to know which way the causal relationship runs: it may be that aggressive children may also be attracted to violent video games." 404 F. Supp. 2d at 1074; *see also* Pet. App. 30a (citing Dr. Anderson study where he could not rule out possibility that "previously hostile adolescents prefer violent media").

Moreover, the evidence cited by Petitioners[7] is far removed from showing any actual significant harmful impact, as numerous other courts have concluded. *See supra* at 15-16. Indeed, the author of the studies on which California primarily relies made numerous admissions in his testimony during the *Blagojevich* case that underscore the flimsiness and unreliability of California's purported evidence. Dr. Anderson has admitted, for example, that an "infinite" number of stimuli, including *even a picture of a gun*, could be responsible for aggressive thoughts, Pet. App. 28a-29a; he has abandoned studies of age effects of exposure to video games based on a suspicion that the studied effects were larger in individuals over 18, *id*. 28a; he and his fellow researchers have failed to show that exposure to video game violence has any greater effect than other violent content to which children are routinely exposed, *Blagojevich*, 404 F. Supp. 2d at 1063; and he has admitted the "glaring empirical gap" of the

[7]Examples include studies of the intensity of noise blasts administered by minors after playing violent video games. *See, e.g.,* ER 605, 615, 617.

lack of longitudinal studies in the research, Pet. App. 28a; *see also Blagojevich*, 404 F. Supp. 2d at 1059-63, 1073-75 (discussing various flaws in evidence).[8]

In sum, the Ninth Circuit hardly went out on a limb in concluding that the State's evidence did not support its proposition that exposure to violent video games is an actual cause of harm to minors, and that "inferences to that effect would not be reasonable." Pet. App. 32a. The State's evidence would be insufficient under any level of First Amendment scrutiny with teeth at all.

Second, lowering the evidentiary standard in evaluating content-based restrictions of speech would be fundamentally inconsistent with the demands of strict scrutiny. The Court has emphasized that "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Playboy*, 529 U.S. at 818. Deferring to the Legislature's inferences without searching review of the basis for those inferences would undermine that fundamental principle of judicial strict scrutiny. As the Court has explained, "[w]hen First Amendment compliance is the point to be proved, the risk of nonpersuasion . . . must rest with the Government, not with the citizen." *Id.*

Petitioners do not cite a single case in support of their argument that the courts should defer to the Legislature's judgment when it targets speech based on its content. That is not surprising, as the Court

[8] The *Blagojevich* testimony is included in the record below in the Supplemental Excerpts of Record (SER) at 73-485.

has squarely held the opposite. *See Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake"); *Sable*, 492 U.S. at 129 (rejecting argument for legislative deference "particularly . . . where the Legislature has concluded that its product does not violate the First Amendment").

Petitioners have no compelling argument to alter this framework. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994), does not suggest otherwise. *Turner* was an intermediate scrutiny case and thus did not involve a content-based restriction on speech where the risk of government censorship is at its greatest and the Court must apply "the most exacting level of First Amendment scrutiny." *Id.* at 661-62. *Turner* also involved a policy-based predictive judgment about an area in which Congress had substantial experience, not an evaluation of scientific evidence that may be scrutinized as effectively (if not more effectively) by a court rather than a self-interested legislative body restricting disfavored speech.

Finally, Petitioners' assertion that evidence of harm is "unobtainable" under "responsible social science," Pet. 13, is wholly unsupported. Petitioners point to not a shred of evidence that the numerous manifest flaws in the social science research are the result of intractable ethical or methodological limitations. Indeed, the record demonstrates that numerous studies have actually attempted to measure the effects of violent video games on minors.

The Ninth Circuit was clear that it is not imposing an impossible hurdle ("scientific certainty") on the State. Pet. App. 32a. The State has simply failed to carry its burden of justifying the speech-restrictive position that it favors.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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